In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

SEP 12 1944
CHARLES ELMORE

No. 460

323US#1
ACM-ARM

ACME BREWING CO. (a corporation),
Petitioner,

vs.

CLIFFORD C. ANGLIM, Collector of Internal Revenue for the First District of California,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

THEODORE J. ROCHE,
Mills Tower, San Francisco,
Attorney for Petitioner.

NORMAN A. EISNER,
Mills Building, San Francisco,
Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

	Page
Petition for Writ of Certiorari	1
Summary and short statement of the matter involved	2
The question presented	6
Basis of jurisdiction	7
Reasons relied on for allowance of writ	7
Prayer	13
Brief in Support of Petition for Writ of Certiorari	15
Opinions of the courts below	15
Jurisdiction	15
Statement of the case	16
Specifications of error	16
Federal statutes involved	16
Argument	17
Purpose of Section 26(c)(1)	17
The contract was legally binding on petitioner	18
Resolutions	19
Analysis of opinion of Supreme Court in Northwest Steel Rolling Mills case	21
Scope and meaning of the term "executed"	25
Comments upon opinion of the Circuit Court of Appeals	27
Conclusion	31

144334

Table of Authorities Cited

Cases

	Pages
Air-Way Electric Appliance Corp. v. Day, 266 U. S. 71, 69 L. Ed. 169	21
Caroline Mills v. Commissioner, 125 Fed. (2d) 857	12
Central Bank of Oakland v. Wells Fargo Bank & Union Trust Co., 18 Cal. App. (2d) 559, 64 P. (2d) 465	18
Chess & Wymond, Inc. v. Glenn, 132 Fed. (2d) 621	10
Chung Kee v. Davidson, 73 Cal. 522, 15 P. 100	19
Colgate v. Harvey, 296 U. S. 404, 80 L. Ed. 299, 102 A.L.R. 54	21
Commercial S. Co. v. Modesto Drug Co., 43 Cal. App. 162, 184 P. 964	27
Commissioner v. Strong Mfg. Co., 124 Fed. (2d) 360	12
Dicker v. Italo-American Oil Corporation, 119 Cal. App. 451, 6 P. (2d) 550	27
Dodd v. Groos (175 Iowa 47), 156 N. W. 845	26
Goetz v. Goldbaum (4 C. U. 749), 37 P. 646	26
Hercules Gasoline Company, Inc. v. Commissioner, Docket No. 111,038	13
Kohler v. Agassiz, 99 Cal. 9, 33 P. 741	19
Le Ballister v. Redwood Theatres, Inc., 1 Cal. App. (2d) 447, 36 P. (2d) 827	18
Lehigh Structural Steel Co. v. Commissioner, 127 Fed. (3d) 67	9
Marysville Electric Light & Power Co. v. Johnson, 93 Cal. 538, 29 P. 126	19
Masten Realty & Mining Co. v. Commissioner, 130 Fed. (2d) 1003	12
Masters v. Walker (89 Ore. 526), 174 P. 1164	26
Minton v. Mitchell, 89 Cal. App. 361, 265 P. 271	26
Monarch Theatres v. Helvering, 137 Fed. (2d) 588	10
More v. Hutchinson, 187 Cal. 623, 203 P. 97	18
Morgenstern v. Bailey, 29 Cal. App. 321 (84 P. (2d) 159)	26

Pages

Northwest Steel Rolling Mills v. Commissioner, 311 U. S. 46, 85 L. Ed. 29 ..... 7, 9, 13, 21

Phebus Oil Co. v. Commissioner, 134 Fed. (2d) 217 11

Reedy and Bixby v. Smith, 42 Cal. 245 26
Remsberg v. Hackney Mfg. Co., 174 Cal. 799, 164 P. 792 ... 27
Rex-Hanover Mills Company v. The United States, 53 Fed. Supp. 235, May 1, 1944 10

Seadden Flat G. M. Co. v. Seadden, 121 Cal. 33, 53 P. 440 .. 25
Scandinavian American Bank v. Wentworth Lumber Co. (101 Ore. 151), 199 P. 624 26
Schlesinger v. Wisconsin, 270 U. S. 230, 70 L. Ed. 557 21

Walker v. Peake (153 S. C. 257), 150 S. E. 756 26
Wathen Distilling Co. v. Commissioner, Vol. I Reports of the Tax Court of the United States, 1188 11
Wilson v. General Water Heater Corporation, 138 Cal. App. 769, 33 P. (2d) 415 27

Yale Petroleum Company v. Commissioner, 2 Tax Court 1039 11

Codes and Statutes

California Civil Code, Sections 1589, 3521 27

Judicial Code (28 U.S.C.A. 347), Section 240 ..... 2, 7

Revenue Act of 1936:
Section 14 4
Section 26(c)(1) 4, 6, 9, 11, 12, 13, 16, 17, 20, 24, 30
Section 26(c)(2) 12, 24
Revenue Act of 1938:
Section 26(c)(4) 11

Miscellaneous

24 Cor. Jur. 278 25

Rule 38 of the Supreme Court of the United States 13, 31

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No.

ACME BREWING CO. (a corporation),
Petitioner,

vs.

CLIFFORD C. ANGLIM, Collector of Internal Revenue for the First District of California,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Owen J. Roberts, Hugo L. Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, Robert H. Jackson and Wiley Rutledge, Associate Justices of the Supreme Court of the United States:

The petitioner, Acme Brewing Co., respectfully prays that a writ of certiorari issue to review a decision of the United States Circuit Court of Appeals

for the Ninth Circuit, rendered on the 26th day of June, 1944, and which become final on the 11th day of August, 1944. The application is under Section 240 of the Judicial Code (28 U.S.C.A. 347). The action is No. 10,588 (C.C.A. 9th Cir.) and is entitled Clifford C. Anglim, Collector of Internal Revenue for the First District of California, Appellant, v. Acme Brewing Co., a corporation, Appellee.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

In December, 1934, Acme Brewing Co. (formerly known as California Brewing Association of Southern California and for convenience hereinafter referred to as "taxpayer") had a brewery under construction in Los Angeles, the completion of which it was unable to finance. (R. 39-42.) The situation was desperate, orders for machinery were cancelled, work was stopped, extensions were obtained from creditors, efforts to obtain funds from all lending sources were fruitless.

Taxpayer had only common stock authorized and outstanding of which 80% was owned by Cereal Products Refining Corporation (later known as Acme Breweries and for convenience hereinafter referred to as "Cereal") and 20% by Bohemian Distributing Co. Neither Cereal nor taxpayer has ever owned any stock of Bohemian and Bohemian has never owned any stock of Cereal. Under date of December 13, 1934, Cereal and Bohemian entered into a contract in writ-

ing to supply taxpayer with an additional $450,000.00 with which to complete its plant, and in addition thereto to supply it with bottles and cases. (R. 44.)

The two stockholders agreed to purchase certain amounts of additional common stock, Cereal agreed to accept common stock in satisfaction of prior indebtedness, and in addition agreed to lend taxpayer $350,000.00 upon its promissory note payable in five annual installments, the first to be due March 1, 1936. The note was to be secured by a deed of trust and chattel mortgage from taxpayer. With respect to this loan, the agreement expressly provided that:

> "It is understood that the California Brewing Association of California shall not pay any dividends to stockholders until said loan of $350,000.00 is entirely liquidated, together with all accrued interest."

The benefits and provisions of this agreement were fully and completely accepted and performed by taxpayer in 1934 and 1935, and long prior to May 1, 1936. The loan of $350,000.00 (increased to $400,000.00 to take up and include a previously existing encumbrance of $50,000.00) was accepted and note, deed of trust and chattel mortgage executed; the stock structure of taxpayer was altered and the stock issued for the specified consideration; bottles and cases were received according to the agreement.

Petitioner regarded itself as bound by the restriction against payment of dividends and carefully observed it. No dividends were paid except on preferred stock after express prior permission was ob-

tained from Cereal for payment of each dividend. (R. 65, 66, 70, 72, 73, 74, 76.) Permission to pay a dividend on common stock was refused by Cereal. (R. 81, 76.) The preferred stock was issued in December, 1936, to meet the need for additional capital.

The Revenue Act of 1936, Section 14, imposed what is commonly referred to as the "Undistributed Profits Tax". It imposed heavy taxes on corporations which did not distribute in dividends to stockholders all of the net income of the corporation earned during the taxable year, in excess of specified credits. One credit is set forth in Section 26(c)(1). It provides for a credit in "an amount equal to the excess of the adjusted net income over the aggregate of the amounts which can be distributed within the taxable year as dividends without violating a provision of a written contract executed by the corporation prior to May 1, 1936, which provision expressly deals with the payment of dividends".

Taxpayer in its returns for 1936 and 1937 claimed the benefit of the credit. It paid an income tax for the year 1936 of $59,831.24 and for the year 1937 of $62,149.29, which amounts the Commissioner found to be correct. At the close of 1937 there still remained a balance of $240,000.00 unpaid upon the promissory note to Cereal.

The Commissioner of Internal Revenue determined that taxpayer was not liable in any amount for an undistributed profits tax for 1936 because the contract of December 13, 1934 prohibited the payment of dividends; but determined that for 1937 taxpayer was

liable for an undistributed profits tax in the sum of $71,161.15 plus interest. These determinations were made "on the ground that a contract *executed* December 13, 1934, which prohibited the payment of dividends by the corporation until a note and mortgage was paid in full, *was a legal restriction* upon the corporation for the year 1936, during which the company was indebted upon said note in the sum of $240,000.00, but that in 1937 the corporation was in a financial position to have paid said note and thereby remove the dividend restriction upon the corporation which prevented the payment of dividends for such year 1937". (R. 25.)

Thereafter, the Commissioner of Internal Revenue assessed the tax for 1937 so determined by him, plus interest, and on May 17, 1939, the taxpayer paid same in the sum of $75,997.18. Within the time provided by law claim was made for refund and action was thereafter brought to recover the money so paid. Judgment was rendered by the United States District Court in favor of taxpayer and the Trial Court expressly found that there was a written contract executed by taxpayer prior to May 1, 1936, which precluded the payment of dividends, and that the failure of taxpayer to pay the balance of $240,000.00 on the promissory note to Cereal during 1937 was fully justified by the financial condition and requirements of the Company. (R. 15.)

From this judgment the Collector appealed. On the appeal, the issue that taxpayer was in a financial condition to have paid the indebtedness during 1937 was

abandoned. Reliance was placed exclusively upon the contention that the contract in writing was not executed by taxpayer. The Circuit Court of Appeals reversed the judgment on this single ground. The issue is stated by the Circuit Court of Appeals (R. 164) as follows:

"As pointed out by taxpayer, the relief from payment of tax on undistributed profits provided for in Section 26(c)(1) requires that a contract creating the obligations which bring such section into operation shall have been executed prior to May 1, 1936, that it be in writing, that it contain a provision expressly dealing with the payment of dividends, and that it be executed by the corporation. The first three conditions are clearly met by the contract. But is the condition met that the contract must be 'executed by the corporation'?"

THE QUESTION PRESENTED.

The sole question presented is the meaning of the term "executed" contained in Section 26(c)(1) of the Revenue Act of 1936. Does a contract have to be signed by a corporation in order to be executed by it, or does the term include those steps or actions by which a corporation becomes legally bound by the terms of the written contract? In this case all of the stockholders entered into a written contract for the express benefit of taxpayer. Those who signed as officers on behalf of Cereal and Bohemian were also officers and directors of taxpayer. Mr. Schuster was

president of both Cereal and taxpayer; Mr. Adams was secretary of both corporations; Mr. Foto, president of Bohemian, was vice president of taxpayer, and Mr. Vitale, secretary of Bohemian, was treasurer of taxpayer.

Taxpayer accepted the benefits of the contract and completely embraced and performed its terms. It is beyond question, and is unhesitatingly admitted by respondent, that taxpayer became *legally bound* by the restriction against payment of dividends contained in the written contract long prior to May 1, 1936.

BASIS OF JURISDICTION.

The question arises directly under the laws of the United States. This Court has jurisdiction under Section 240 of the Judicial Code, 28 U.S.C. 347.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

The issue in this case hinges primarily on what was decided by this Court in *Northwest Steel Rolling Mills v. Commissioner,* 311 U. S. 46, 85 L. Ed. 29. That case came up from the Ninth Circuit, which had decided (110 Fed. (2d) 286) that general laws of the State of Washington restricting the payment of dividends were by implication a part of the corporate charter of taxpayer, and therefore constituted a part of a written contract executed by the corporation. In arriving at this decision, the Circuit Court of Appeals

had come to two distinct conclusions: (1) that a corporate charter is a written contract executed by a corporation, notwithstanding it is not signed by the corporation and the corporation does not come into existence until after the instrument has been signed and filed; and (2) that the general laws of the state of incorporation, although neither referred to nor mentioned in the charter, constituted a part of the executed written contract.

This Court reversed the Circuit Court of Appeals because of its second conclusion. It held that what restricted the payment of dividends was not the written contracts, but a general state law; that the statute provided a credit in the case of a restriction included in and which was a part of a written contract, but not in the case of restriction which existed only as a matter of general state law. This Court did not disagree with the conclusion that the corporate charter was a written contract executed by the corporation, nor did it disapprove of any of the several grounds upon which the Circuit Court of Appeals had based its decision in this respect.

In the opinion, however, while emphasizing the difference betwen a written contract and a state law, this Court used some language that has led to confusion and disagreement between the Circuits. A conflict exists, and it is a much debated question, whether or not this Court intended to decide that in order to constitute an executed written contract the instrument must be signed by the corporation. The following are the words that have caused the uncertainty:

> "The natural impression conveyed by the words 'written contract executed by the corporation' is that an explicit understanding has been reached, reduced to writing, *signed* and delivered. True, obligations not set out at length in a written contract may be incorporated by specific reference, or even by implication. The Congress indicated that any exempted prohibition against dividend payment must be expressly written in the executed contract. It did this by adding a precautionary clause that the granted credit can only result from a provision which 'expressly deals with the payment of dividends'."[1]

In the face of the foregoing language, the Ninth Circuit, which was reversed, has now construed the decision as holding that a written contract to be executed in accordance with the requirements of Section 26(c)(1) must be signed by the corporation.

We believe that such a conclusion is not in accord with the decision of this Court. The decision proceeds upon the assumption that a charter is an executed written contract and it is implicit that if the restriction contained in the statute had been expressly embodied in the charter, or even incorporated by reference, the judgment would not have been reversed.

In *Lehigh Structural Steel Co. v. Commissioner*, 127 Fed. (3d) 67, 69, the Circuit Court of Appeals, Third Circuit, carefully analyzes the decision of this Court in the *Northwest Steel Rolling Mills* case and holds that

---

[1]Emphasis added unless otherwise expressly noted.

> "We find nothing in the opinion to warrant the argument that neither a charter nor a certificate of stock can ever be the kind of 'written contract' which is meant by Section 26(c)(1)."

In *Monarch Theatres v. Helvering,* 137 Fed. (2d) 588, 590, the Circuit Court of Appeals of the Second Circuit, in holding that a corporate resolution is a good "execution" of a written contract, had the following to say regarding the controversial language (p. 590):

> "The often quoted language of Mr. Justice Black in Helvering v. Northwest Steel Rolling Mills, supra, 311 U. S. 46, 49, 61 S. Ct. 109, 85 L. Ed. 29, was used discursively and by way of example; it is not to be understood as laying down absolute doctrine."

In *Rex-Hanover Mills Company v. The United States,* 53 Fed. Supp. 235, May 1, 1944, the Court of Claims comments on the confusion and holds that the language in the Northwest Steel Rolling Mills opinion should not be extended beyond the issue decided—that the credit is allowed in the case of restrictions provided for in written agreements and not in the case of restrictions by statute.

In *Chess & Wymond, Inc. v. Glenn,* 132 Fed. (2d) 621, the Circuit Court of Appeals of the Sixth Circuit affirmed a decision of the United States District Court for the Western District of Kentucky, 40 Fed. Supp. 666, holding that a personal letter from the president of the taxpayer to the president of a bank, and in reliance upon which money was loaned, was a written

contract executed by taxpayer within the meaning of Section 26(c)(1).

The case of *Chess & Wymond, Inc. Supp.* is relied upon by the Tax Court in *Wathen Distilling Co. v. Commissioner,* Vol. I Reports of the Tax Court of the United States, 1188, 1194-1195.

In *Yale Petroleum Company v. Commissioner,* 2 Tax Court 1039, the Tax Court had under consideration Section 26(c)(4) of the Revenue Act of 1938. That section provides a credit for indebtedness, "evidenced by a bond and note, debenture, certificate of indebtedness, mortgage or deed of trust *issued* by the corporation". The word "issued" was held to include contracts made legally binding upon the corporation though not signed by the corporation. The close analogy between "executed" and "issued" is recognized and commented upon.

In *Phebus Oil Co. v. Commissioner,* 134 Fed. (2d) 217, decided by the Fifth Circuit and cited in the opinion of the Circuit Court of Appeals in this case, the credit was denied on the ground that the provisions of an agreement entered into between those holding control of Phebus Oil Co. were not for the benefit of Phebus Oil Co., but exclusively for the benefit of the parties to the agreement. Phebus Oil Co. was used merely as an instrumentality to perform and carry out certain provisions not for its benefit, but for the benefit of others. The clear implication is that if, as in the case at bar, Phebus Oil Co. had accepted provisions for its benefit and had become bound by corresponding restrictions against payment of dividends

contained in the agreement, the credit would have been allowed. When carefully read this decision supports the interpretation of taxpayer in this case.

In *Commissioner v. Strong Mfg. Co.,* 124 Fed. (2d) 360, the Circuit Court of Appeals of the Sixth Circuit repudiated a narrow construction of Section 26(c)(2), a companion Section of 26(c)(1), which would make that section "unreasonable, capricious and discriminatory".

Masten Realty & Mining Co. v. Commissioner, 130 Fed. (2d) 1003, decision by the Eighth Circuit, also cited by the Circuit Court of Appeals in this action, is distinguishable. A letter was written to the taxpayer offering to lend money, provided dividends were not paid until the loan was repaid. No action of any kind was taken by taxpayer until *after* all loans had been made. Thereafter, the Board of Directors passed a resolution of general policy, to the effect that the company would not pay dividends until its current loans were paid. The opinion points out that the writer of the letter could by no possibility have made a loan in reliance upon the resolution. There was, moreover, a strong dissenting opinion in the *Masten* case, which we most respectfully ask this Court to consider.

In *Caroline Mills v. Commissioner,* 125 Fed. (2d) 857, a decision of the Fifth Circuit, and the only other case relied upon by the Circuit Court of Appeals in the case at bar, there was no written contract whatsoever which embodied a restriction against the payment of dividends. There was a stockholders' resolu-

tion, which referred to an oral understanding between a committee of bondholders and a committee of stockholders. There was also a strong dissenting opinion in this case and when it was before the Board of Tax Appeals, six members dissented and held the resolution to be a sufficient compliance with Section 26(c)(1).

In *Hercules Gasoline Company, Inc. v. Commissioner,* Docket No. 111,038, decided by the Tax Court on July 31, 1944, that Court construes the *Northwest Steel Mills* case as holding that a corporate charter is not an executed written contract, but at the same time comments on the conflict between the Circuits.

It is respectfully submitted that this Court should clarify this issue. If it be its decision that a corporation is not entitled to the credit provided for by Section 26(c)(1) unless it has signed the contract, that should be settled. If such be not its decision, if the language was not intended to be so restricted or limited, that should be settled. The proper construction of the federal statute presented by the issue in this case should now be clarified and the conflict between the Circuits removed. The case is undoubtedly a proper one for certiorari to issue under Rule 38 of this Court.

PRAYER.

Wherefore, petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that Court

to certify and send to this Court for review and determination, on a day certain to be therein named, a full and complete transcript of the record and of all the proceedings in the case entitled Acme Brewing Co., a corporation, Plaintiff and Respondent, v. Clifford C. Anglim, Collector of Internal Revenue for the First District of California, Defendant and Appellant, and being No. 10,582 of the records of said Court, to the end that said cause may be reviewed and determined by this Honorable Court as provided by the statutes of the United States, and for such other and further relief as may be proper.

Dated, San Francisco, California,
September 6, 1944.

THEODORE J. ROCHE,
Attorney for Petitioner.

NORMAN A. EISNER,
Of Counsel.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No.

ACME BREWING CO. (a corporation),
Petitioner,

vs.

CLIFFORD C. ANGLIM, Collector of Internal Revenue for the First District of California,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS OF THE COURTS BELOW.

The Circuit Court of Appeals (R. 161); 143 F. (2d) 412.

No opinion by the United States District Court. Findings and judgment. (R. 12, 18.)

JURISDICTION.

A statement of the basis on which this Court has jurisdiction to grant the writ is set forth at page 7 of the petition.

STATEMENT OF THE CASE.

For the purposes hereof petitioner relies upon the statement of the case on pages 2-6 of the petition.

SPECIFICATIONS OF ERROR.

The Circuit Court of Appeals erred in the following particulars:

1. In holding that a contract in writing made for the express benefit of a corporation, and the terms and provisions of which are accepted and adopted by the corporation so as to become legally binding upon it, is not a contract "executed" by the corporation within the meaning of Section 26(c)(1) of the Revenue Act of 1936.

2. In concluding from certain language, disassociated from its context, used by this Court in the *Northwest Steel Rolling Mills* case, that it was the intent of this Court to rule that "signing" by a corporation is essential to "execution" within the meaning of Section 26(c)(1) of the Revenue Act of 1936.

FEDERAL STATUTES INVOLVED.

Revenue Act of 1936:

"Sec. 26. Credits of Corporations.

"In the case of a corporation the following credits shall be allowed to the extent provided in the various sections imposing tax—

"(c) Contracts Restricting Payment of Dividends.

"(1) Prohibition on payment of dividends. An amount equal to the excess of the adjusted net income over the aggregate of the amounts which can be distributed within the taxable year as dividends without violating a provision of a written contract executed by the corporation prior to May 1, 1936, which provision expressly deals with the payment of dividends. * * *"

ARGUMENT.

PURPOSE OF SECTION 26(c)(1).

It was only reasonable, and obviously was the intent of Congress, to avoid penalizing a corporation which was legally bound by a written agreement to refrain from distributing its earnings in dividends. In order to guard against fraudulent claims two precautions were taken: (1) the agreement had to be made prior to May 1, 1936, which was before the Act which imposed the tax became effective; (2) it had to be evidenced in writing. The purpose in back of both of these precautions is reasonable and logical. The Act, after its provisions were known, could be readily evaded by purposely entering into an agreement containing such a restriction, and an oral agreement could with too much facility be fraudulently and collusively proved.

There would be neither reason nor logic in limiting the method or procedure by which a corporation could become legally bound by the terms of the written contract. On the contrary, such a limitation would be arbitrary and discriminatory. The corporation could

only become legally bound by certain actions upon its part. The legal effect of such actions would be for the Court to determine. It could not have been the intent of Congress to confine the credit to corporations which by more or less fortuitous circumstances, had followed the particular procedure of "signing" to evidence the fact that the terms of the writing were legally binding upon it.

THE CONTRACT WAS LEGALLY BINDING ON PETITIONER.

The contract was entered into for the benefit of petitioner. The provisions for its benefit were open for its acceptance. Such acceptance could be manifested in different ways, as, for example, legal action based upon the contract, or actual acceptance of its benefits. When accepted, petitioner became entitled to the rights in its favor and at the same time subject to the corresponding liabilities and restrictions in favor of the other parties to the contract.

More v. Hutchinson, 187 Cal. 623, 625, 628, 203 P. 97;

Central Bank of Oakland v. Wells Fargo Bank & Union Trust Co., 18 Cal. App. (2d) 559, 561, 563, 64 P. (2d) 465.

An agreement that in direct and unmistakable terms is made for the benefit of another is made expressly for his benefit. It is unnecessary that it be made exclusively for his benefit or that he be named in the agreement.

Le Ballister v. Redwood Theatres, Inc., 1 Cal. App. (2d) 447, 448, 36 P. (2d) 827;

Chung Kee v. Davidson, 73 Cal. 522, 525, 15 P. 100;

Marysville Electric Light & Power Co. v. Johnson, 93 Cal. 538, 546, 29 P. 126;

Kohler v. Agassiz, 99 Cal. 9, 15, 33 P. 741.

Resolutions and acts on the part of petitioner, which constituted an acceptance of benefits and entailed a corresponding assumption of liabilities, included the following:

RESOLUTIONS.

1. Changing the capital structure, in exact accord with the agreement. (R. 54.)

2. To issue 15,000 shares to Cereal in satisfaction of $150,000.00 of indebtedness to Cereal, in exact accord with the agreement. (R. 56.)

3. To purchase from Cereal, cooperage, bottles and cases for $100,000.00, in exact accord with the agreement. (R. 55.)

4. To sell to Cereal 10,000 additional shares for $100,000.00, in exact accord with the agreement. (R. 57.)

5. To sell to Bohemian 10,000 shares for $100,000.00, in exact accord with the agreement. (R. 55.)

6. To increase the Board of Directors to seven members, in exact accord with the agreement. (R. 54.)

7. To borrow $350,000.00 from Cereal, and execute note, deed of trust and chattel mortgage, in exact accord with the agreement. (R. 56.)

The note, deed of trust and chattel mortgage were executed under date of May 7, 1935.

All authorized acts were taken long prior to May 1, 1936.

One of the rights and benefits accepted and retained by petitioner was the loan of $350,000.00 from Cereal. One of the corresponding obligations or liabilities assumed was the restriction against payment of dividends until the loan was fully repaid.

One method by which petitioner could have evidenced its acceptance of the provisions of the contract was by subscribing its acceptance to the instrument. Let us assume that petitioner had subscribed the following to the written instrument: "Accepted Acme Brewing Company, by Karl F. Schuster, President." If the foregoing had occurred, no one would question the sufficiency of the "execution". No one would doubt that petitioner would then be entitled to the credit under Section 26(c)(1). Yet, the legal effect of such subscription would have been identical with the legal effect of the acts actually taken by petitioner. The acts taken by petitioner completely embraced the provisions of the agreement, and express reference to the agreement would have added nothing and would have been superfluous. The difference between a subscription of acceptance and the steps actually taken by petitioner would consist only in the method or means by which the fact of acceptance would be evidenced. Is a distinction to be drawn between acts, which have the same legal effect? Is the one to be regarded as "execution" entitling the taxpayer to a credit under the Revenue Act, and the other to be regarded as insufficient for that purpose? This Court has many times held that classifications

"must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced will be treated alike * * *. The classification in order to avoid the constitutional prohibition, must be founded upon pertinent and real differences, as distinguished from irrelevant and artificial ones. The test to be applied in such cases as the present one is—does the statute arbitrarily and without genuine reason impose a burden upon one group of taxpayers from which it exempts another group, both of them occupying substantially the same relation toward the subject matter of the legislation? Mere difference is not enough."

Colgate v. Harvey, 296 U. S. 404, 80 L. Ed. 299, 307, 102 A.L.R. 54, 61;

Air-Way Electric Appliance Corp. v. Day, 266 U. S. 71, 85, 69 L. Ed. 169, 177;

Schlesinger v. Wisconsin, 270 U. S. 230, 240, 70 L. Ed. 557, 564.

The question is whether so narrow a construction is to be placed on the term "executed" as to exclude acts (other than signing), which have the legal effect of binding the corporation by the terms of the written contract.

ANALYSIS OF OPINION OF SUPREME COURT IN NORTHWEST STEEL ROLLING MILLS CASE.

Inasmuch as the Government places entire reliance upon the language of this Court in the *Northwest Steel Mills* case, the opinion of the Circuit Court of

Appeals quotes it, and its significance has been variously interpreted, we shall endeavor to analyze the opinion.

It must be borne in mind that this Court was reviewing a decision of the Circuit Court of Appeals. That Court had decided, forthrightly, that a written contract did not have to be signed by the corporation in order to be "executed" by it. In fact, it could be signed by individuals before the corporation came into existence and thereafter accepted and adopted by the corporation. In coming to that conclusion the Circuit Court of Appeals relied upon and expounded certain definite principles of law. It said in part:

> "Be that as it may, the fact remains that by accepting the corporate charter, the corporation *became bound* by the acts of the incorporators in so executing the articles, *whether we rely upon a theory of novation, ratification or continuing offer* * * * *We do not believe that Congress intended the word 'executed' to have such a narrow meaning as to exclude the act of becoming bound by ratifiaction.* * * * As stated in 23 Cor. Jur. 278: 'The words "execute", "executed" and "execution" when used in their proper sense, convey the meaning of carrying out some act or course of conduct to its completion. Thus when the terms are applied to a written instrument, they include the performance of all acts which may be necessary to render it complete as an instrument importing the intended obligation, of every act required to give the instrument validity or to carry it into effect or to give it the forms required to render it valid.'
>
> * * * * * * *

"This impels the conclusion that the Act in question should be construed so as to include the taxpayer's corporate charter within the term 'written contract executed by the corporation, etc.' *There seems to be grave doubts as to whether there is a reasonable basis for discrimination between a written contract actually 'signed' by a corporation prohibiting the payment of dividends, and the contract of the charter to which the corporation is as fully bound, likewise prohibiting the distribution of profits.* The 'administrative convenience' which we have above held lends a basis for the distinction betwen oral and written contracts, would not seem to apply with equal force to this situation.

* * * * * * *

"The Supreme Court has said that a statute should be construed to avoid not only the conclusion that it is unconstitutional, but also grave doubt as to its constitutionality. Linder v. United States, 288 U. S. 17, 45 S. Ct. 446, 69 L. Ed. 619, 39 A. L. R. 229."

In reviewing this decision, this Court did not disapprove of either the foregoing conclusions or the legal principles declared. On the contrary, the decision proceeds upon the assumption that a corporate charter is a written contract "executed" by the corporation. The opinion states the question under consideration in the following words:

"Upon the premises that respondent's Washington charter was a written contract, and that the Washington laws prohibiting dividend payments were by operation of law a part of that contract, the court below concluded that the tax-

payer had satisfied the requirements of Section 26 (c) (1). *We must therefore decide whether Section 26 (c) (1) authorized a credit or deduction to corporations prohibited by state law from distributing dividends.*"

The opinion traces the history of Sections 26(c)(1) and 26(c)(2) and points out that the present language is the equivalent of the words "contractually obligated" originally contained in the Act.

In reasoning that the provision restricting the payment of dividends must be included in the written instrument itself, this Court said:

> "The natural impression conveyed by the words 'written contract executed by the corporation' is that an explicit understanding has been reached, reduced to writing, signed and delivered. True, obligations not set out at length in a written contract may be incorporated by specific reference, or even by implication. The Congress indicated that any exempted prohibition against dividend payment must be expressly written in the executed contract. It did this by adding a precautionary clause that the granted credit can only result from a provision which 'expressly deals with the payment of dividends'."

In summarizing, it is stated:

> *"It is clear, therefore, that what prohibited respondent from distributing dividends was not the provision of an executed written contract expressly dealing with the payment of dividends. On the contrary, what prohibited respondent from paying dividends was a valid law of the State of Washington."*

We believe that it was not the intent of this Court to indicate that there must be any particular method of execution of the written contract—that it must be signed by the corporation. If such had been the intent, the tree would have been hewn at the roots and the case would have been decided upon the ground that there was no written contract. It would not have been decided upon the ground that the restriction was a matter of state law and not a provision contained in the instrument.

SCOPE AND MEANING OF THE TERM "EXECUTED".

The term "executed" when applied to a written instrument includes acceptance, ratification, adoption or any other acts sufficient in law to give validity and binding effect to the written instrument.

> "The words 'execute', 'executed' and 'execution' when used in their proper sense, convey the meaning of carrying out some act or course of conduct to its completion. Thus when the terms are applied to a written instrument, they include the performance of all acts which may be necessary to render it complete as an instrument importing the intended obligation, of every act required to give the instrument validity or to carry it into effect or to give it the forms required to render it valid."
>
> 24 *Cor. Jur.* 278.

Ratification, acceptance or adoption may be proved in support of an allegation of "execution".

> *Scadden Flat G. M. Co. v. Scadden,* 121 Cal. 33, 37-39, 53 P. 440;

Scandinavian American Bank v. Wentworth Lumber Co. (101 Ore. 151), 199 P. 624, 626;
Masters v. Walker (89 Ore. 526), 174 P. 1164;
Dodd v. Groos (175 Iowa 47), 156 N. W. 845, 849;
Walker v. Peake (153 S. C. 257), 150 S. E. 756, 763;
Goetz v. Goldbaum (4 C. U. 749), 37 P. 646.

In *Reedy and Bixby v. Smith,* 42 Cal. 245, 250, the Supreme Court of California held that an unsigned contract, recognized and acted upon, had been "executed":

> "Under the circumstances revealed by the evidence, I think the Court properly found that the contract had been *executed* and was binding upon both parties. *Both had acted upon it as a binding contract. The plaintiffs certainly would have been estopped from denying that it had become binding upon them, had suit been brought upon it by the defendants.*"

In *Morgenstern v. Bailey,* 29 Cal. App. 321, 324 (84 P. (2d) 159), the District Court of Appeal of California stated:

> "An agreement in writing which is signed and delivered by the promisor and accepted and acted upon by both parties, is sufficiently *executed* to make it a binding obligation of the parties signing it."
>
> "A party who accepts the benefits of a contract is bound thereby even if he has not signed it."
>
> *Minton v. Mitchell,* 89 Cal. App. 361, 370, 265 P. 271;

Remsberg v. Hackney Mfg. Co., 174 Cal. 799, 802, 164 P. 792;
Dicker v. Italo-American Oil Corporation, 119 Cal. App. 451, 455, 6 P. (2d) 550;
Wilson v. General Water Heater Corporation, 138 Cal. App. 769, 772-773, 33 P. (2d) 415;
Commercial S. Co. v. Modesto Drug Co., 43 Cal. App. 162, 174-176, 184 P. 964;
Cal. Civil Code, Sections 1589, 3521.

COMMENTS UPON OPINION OF THE CIRCUIT COURT OF APPEALS.

We have stated that this agreement was for the express benefit of taxpayer. The opinion of the Circuit Court of Appeals states that taxpayer "was to a considerable extent the third party beneficiary". This is an understatement. The Circuit Court refers to one provision that is expressly, and as an exception, declared not to be for the express benefit of taxpayer. This one provision renders it optional with the two stockholders, Cereal and Bohemian, to advance to taxpayer money to pay an installment of the note to Cereal, if taxpayer should be unable to meet it. It was a provision to protect Bohemian, the minority stockholder, against default that might result in foreclosure. The agreement recites that this particular provision is not for the benefit of taxpayer. The insertion of this express exception constitutes a recognition that the other provisions are for taxpayer's express benefit, and that this particular provision required an express

exception in order not to fall within the same category. The agreement, however, is so obviously for the express benefit of taxpayer that it is unnecessary to resort to the rule of construction: *Inclusio unius est exclusio alterius.*

In the opinion of the Circuit Court of Appeals, the manner in which the foregoing exception is printed is misleading. The words of exception are followed by the restriction against the payment of dividends with which there is no connection whatsoever. The restriction against payment of dividends continues so long as the note to Cereal remains unpaid, and there is no question but that the provision in the contract by which Cereal agreed to lend the $350,000.00 to taxpayer was one of the many provisions of the contract for the benefit of taxpayer, enforceable by taxpayer and actually accepted by it. If taxpayer had been an express party to the agreement, and had signed it as such, its rights and obligations would have been identical with those received and assumed by acceptance of its benefits. The provision respecting advances to meet an installment of the note would still have been optional to the other parties under the express terms of the agreement.

The opinion recites that:

> "After it was signed a series of resolutions were passed by taxpayer's directors changing the capital stock structure of the corporation, issuing shares of stock to Cereal Products and Bohemian Co., and taking other action. The resolutions *conform exactly* to the plan detailed in the contract,

but mention of the contract is absent and seems to have been studiously avoided."

All the steps were taken long prior to the enactment of the undistributed profits tax. By the series of resolutions referred to taxpayer meticulously authorized the performance of every detail of the contract. It is true that the resolutions do not expressly refer to the contract, but there was no occasion for such a reference and the connection between the contract and the acts authorized was too obvious to require such a reference. It is customary to authorize a conveyance to be executed or a payment to be made for a specified consideration, without setting forth that the authorization is in response to an offer that has been received, and yet when the connection is obvious, no one would suggest that there was an insufficient acceptance of the offer by reason of absence of such an express reference. This, and not any desire to avoid mention of the contract, constitutes the only reasonable explanation of failure to mention the contract specifically in the resolutions.

The opinion indicates that the taxpayer repeatedly and consistently recognized the contract and restrictions as binding upon it. A number of resolutions were passed requesting permission of Cereal to pay a dividend on preferred stock issued by taxpayer. This preferred stock was not issued until the end of 1936 and the first dividend did not become payable until April 1, 1937. The first resolution asking permission of Cereal to pay the dividend was passed March 8, 1937. The opinion states that as this resolution was

passed after May 1, 1936, it "fails to satisfy the terms of the statute". Is this an implication that if such a resolution recognizing the restriction as binding had been passed prior to May 1, 1936, it would have satisfied the statute? If so, a distinction is being drawn that ignores actualities and substance. The resolutions passed constituted such a recognition in fact and in law.

The opinion states that "the certainty of a writing is lacking in the circumstances of the instant case". What certainly is lacking? Surely, the restriction is in clear and indubitable language. Likewise, are set forth in detail what taxpayer is to receive and what it is to do. If taxpayer had at the bottom of the contract appended a written acceptance, the contract terms would have been unchanged and yet it is inconceivable that its sufficiency or certainty would have been questioned. At another point, the opinion definitely states that all requirements of Section 26(c)(1) are satisfied by the contract in this case and the sole question is the sufficiency of its "execution".

> "As pointed out by taxpayer, the relief from payment of tax on undistributed profits provided for in Sec. 26 (c) (1) *requires that a contract creating the obligations which bring such section into operation shall have been executed prior to May 1, 1936, that it be in writing, that it contain a provision expressly dealing with the payment of dividends, and that it be executed by the corporation. The first three conditions are clearly met by the contract. But is the condition met that the contract must be 'executed' by the corporation?"*

In other words, if this contract had appended to it a written signature or acceptance, petitioner would admittedly be entitled to the credit. Yet, it is conceded that petitioner prior to May 1, 1936, became, by accepting the benefits of this contract and executing and adopting its provisions, legally bound thereby and to a like extent as if the instrument had been signed by it.

CONCLUSION.

In the one case in which this statute was before this Court, language was used that has created ambiguity and uncertainty. Different Circuits have drawn different inferences and their decisions are now in conflict. Quoting this language, the Circuit Court of Appeals of the Ninth Circuit has directly reversed its former position, and, we are confident, has placed a construction thereon that was never intended.

Petitioner respectfully submits that the case presented is one proper for review under Rule 38 of this Court and that a writ of certiorari should issue as prayed.

Dated, San Francisco, California,
September 6, 1944.

Respectfully submitted,
THEODORE J. ROCHE,
Attorney for Petitioner.

NORMAN A. EISNER,
Of Counsel.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute and regulations involved	2
Statement	4
Argument	8
Conclusion	11

CITATIONS

Cases:

Bolivian International Mining Corp. v. *Commissioner*, 1 T. C. 1110, affirmed *per curiam*, 142 F. 2d 556 11

Caroline Mills v. *Commissioner*, 126 F. 2d 857 11

Helvering v. *Northwest Steel Mills*, 311 U. S. 46 ..... 9, 10, 11

Phebus Oil Co. v. *Commissioner*, 134 F. 2d 217 11

Statute:

Revenue Act of 1936, c. 690, 49 Stat. 1648, Sec. 26 ..... 2, 8, 9, 10

Miscellaneous:

Mechem, Agency (1923 ed.):

Pp. 75–77 9

P. 79 9

Pp. 82–83 9

Pp. 89–93 9

Pp. 96–97 9

Treasury Regulations 94, Art. 26–2 3

2 Williston, Contracts (1936 ed.) pp. 1041–1161 8

612172—44

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 460

ACME BREWING CO., A CORPORATION, PETITIONER

v.

CLIFFORD C. ANGLIM, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 161–166) is reported at 143 F. 2d 412.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 26, 1944 (R. 167), and the petition for rehearing was denied on August 11, 1944 (R. 168). The petition for a writ of certiorari was filed on September 12, 1944. The jurisdiction of this Court is invoked under Sec-

tion 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a written contract entered into between the two sole stockholders of the petitioner corporation on their own behalf, the provisions of which were carried out by petitioner to its benefit, is "a written contract executed by the corporation" within the meaning of Section 26 (c) (1) of the Revenue Act of 1936 so as to entitle petitioner to a credit against 1937 surtax on undistributed profits.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

> SEC. 26. CREDITS OF CORPORATIONS.
>
> In the case of a corporation the following credits shall be allowed to the extent provided in the various sections imposing tax—
>
> * * * * *
>
> (c) *Contracts Restricting Payment of Dividends.*—
>
> (1) *Prohibition on payment of dividends.*—An amount equal to the excess of the adjusted net income over the aggregate of the amounts which can be distributed within the taxable year as dividends without violating a provision of a written contract executed by the corporation prior to May 1, 1936, which provision expressly deals with the payment of dividends. If a

corporation would be entitled to a credit under this paragraph because of a contract provision and also to one or more credits because of other contract provisions, only the largest of such credits shall be allowed, and for such purpose if two or more credits are equal in amount only one shall be taken into account.

* * * * *

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

ART. 26–2. *Credit in connection with contracts restricting payment of dividends.*—(*a*) The credit provided in section 26 (c) with respect to contracts restricting the payment of dividends is not available under every contract which might operate to restrict the payment of dividends, but only with respect to those provisions of written contracts executed by the corporation prior to May 1, 1936, which satisfy the conditions prescribed in the Act. The charter of a corporation does not constitute a written contract executed by the corporation within the meaning of section 26 (c). The provisions recognized by the Act are of two general types, as follows:

(1) Those which come within section 26 (c) (1), in that they prohibit or limit the payment of dividends during the taxable year; and

* * * * *

(*b*) *Prohibition on payment of dividends.*—The credit provided in section 26

(c) (1) is allowable only with respect to a written contract executed by the corporation prior to May 1, 1936, which expressly deals with the payment of dividends and operates as a legal restriction upon the corporation as to the amounts which it can distribute within the taxable year as dividends. * * *

* * * * *

STATEMENT

On November 18, 1941, petitioner, a California corporation having its principal place of business in San Francisco, filed suit in the United States District Court for the Northern District of California for refund of $75,997.18, alleged to have been illegally collected in 1939 as undistributed profits surtax for the calendar year 1937, together with interest thereon (R. 2–7, 12–13, 16–17). Payment of the $75,997.18 had resulted from the denial of petitioner's claim for credit against undistributed profits surtax under Section 26 (c) (1) of the Revenue Act of 1936 (R. 15). The contract (see *infra,* pp. 5–8) upon which petitioner relied for credit under Section 6 (c) (1) was executed on December 13, 1934 (R. 15). The Commissioner deemed it binding on petitioner so far as payment of dividends in 1936 was concerned, but disallowed credit for 1937 on the ground that petitioner was in a financial position during that year to pay off its indebtedness and

thereby remove the dividend restriction contained in the contract (R. 15–16, 35–36).

The Collector of Internal Revenue, by answer filed in the District Court, denied that the 1937 tax, together with interest, had been illegally collected (R. 8–11). A hearing was held, at which evidence was received (R. 20–139). The District Court subsequently filed findings of fact and conclusions of law (R. 12–18), finding that petitioner was actuated by sound business reasons, that its board of directors had acted reasonably and in good faith in not paying off the indebtedness and removing the contractual dividend restriction in 1937 (R. 16), and that the contract relied upon by petitioner for credit was a written contract executed by petitioner prior to May 1, 1936, and contained a provision binding petitioner not to pay dividends during 1937 (R. 15).[1] Accordingly, the court rendered judgment for petitioner (R. 18–20). On appeal, the Circuit Court of Appeals reversed the judgment of the District Court (R. 167), holding that the contract was not one executed by the petitioner corporation (R. 160–166).

The pertinent facts with respect to the contract may be summarized as follows:

In December 1934, the capital stock of petitioner (formerly known as the California Brewing

[1] The court's findings of fact did not include the facts upon which this latter conclusion was based.

Association of Southern California) was owned 80% by the Cereal Products Refining Corporation (later known as Acme Breweries, but referred to hereinafter as Cereal) and 20% by the Bohemian Distributing Company (hereinafter referred to as Bohemian (R. 20–21, 22, 44, 100–101, 102).

On December 13, 1934, Cereal and Bohemian entered into a written contract, each on its own behalf (R. 44). In the contract both parties agreed that petitioner's board of directors should be increased to seven members and petitioner's stock voted so that Cereal could select five directors and Bohemian two out of certain named persons (R. 49); that petitioner's capital structure should be altered so as to provide 100,000 shares of stock at $10 par value (R. 45); that each party would purchase 10,000 additional shares of stock in the petitioner corporation (R. 45–46); and that, if petitioner sold or offered any additional stock for sale, the stock should first be offered to Cereal and Bohemian in proportion to their respective holdings (R. 49). Bohemian agreed to give Cereal the first opportunity, and a 30-day option, to purchase any stock in petitioner which Bohemian desired to sell (R. 49). Cereal agreed to sell petitioner cooperage, bottles and cases to the value of $100,000; to accept 15,000 shares of stock from petitioner in satisfaction of $150,000 petitioner owed it (R. 45); and to lend petitioner $350,000 for the construction of a plant, the loan

to be evidenced by a promissory note secured by a deed of trust (R. 46–47, 48). Both parties agreed that the loan was to be paid off in designated installments and that, in the event petitioner did not have sufficient surplus to pay an installment, each would advance petitioner an amount in proportion to its respective stockholding in petitioner, to enable petitioner to meet the installment (R. 47–48). This provision was stated not to be made for the benefit of petitioner (R. 48). In the same paragraph, the parties agreed that petitioner should have the option of paying installments prior to their due date if it had sufficient earnings and cash surplus to justify such payments (R. 48). Immediately following this provision, the contract provided (R. 48):

> It is understood that the California Brewing Association of Southern California [petitioner] shall not pay any dividends to stockholders until said loan of $350,000.00 is entirely liquidated, together with all accrued interest.

Without referring to this contract, petitioner's board of directors subsequently passed resolutions conforming to the plan detailed in the contract (see, *e.g.*, R. 55, 56–57). With respect to the $350,000 loan, petitioner's board of directors passed a resolution to borrow an additional $50,000 from Cereal to satisfy an outstanding mortgage and to execute a promissory note, secured by a trust deed, in the amount of $400,000 (R. 56–57).

No mention of the contract or dividend restriction was made in the resolution, promissory note, or trust deed. Bohemian gave its written consent to Cereal to loan petitioner the additional $50,000 and to increase the amount of the promissory note to $400,000 (R. 51). The dividend restriction was mentioned by petitioner for the first time on March 8, 1937, when petitioner's board of directors passed a resolution to request Cereal to allow it to pay dividends on preferred stock, stating that petitioner was bound by the restriction (R. 65–66).

ARGUMENT

Petitioner contends (Pet. 18–31) that the written contract between its two stockholders, Cereal and Bohemian, was one "executed by the [petitioner] corporation" within the meaning of Section 26 (c) (1) of the Revenue Act of 1936, *supra*, pp. 2–3, because the corporation passed resolutions to carry the contract into effect and received benefits from it. We submit that the contention is unsound.

The fact that a contract between two parties inures to the benefit of a third party may, in some instances, permit the third party beneficiary to enforce the contract against the party from whom the benefits are to move, but the acceptance of benefits from the contract does not make the third party beneficiary a party to it or subject to its liabilities. See 2 Williston on Contracts (1936

ed.) pp. 1041–1161. The performance of a contract and acceptance of its benefits may make one a party to a contract when the acceptance of benefits constitutes a ratification of the contract. Mechem, Agency (1923 ed.) pp. 89–93. But in such a case the elements of ratification must be present. *Ibid.* To be ratified, a contract must have been made by someone purporting to act as the agent of another (*id.*, pp. 75–77, 79, 82–83) and, when ratified, the agent is released from liability under it (*id.*, pp. 96–97). Here, neither Cereal nor Bohemian purported to act as petitioner's agent; the contract was binding on them when made, and remained so. Hence, it was a contract "executed" by Cereal and Bohemian. They could, of course, carry out its provisions through their control of petitioner's board of directors and thus make the contract binding on petitioner. This fact is immaterial, however, for a credit under Section 26 (c) (1) may result only from a written contract "executed by the corporation," and, as this Court held in *Helvering* v. *Northwest Steel Mills,* 311 U. S. 46, the section is to be strictly construed against the taxpayer. A corporation is, of course, an entity separate and distinct from its stockholders.[2]

---

[2] None of the state decisions cited by petitioner (Pet. 18–19, 25–27) conflicts with the statements made in this paragraph. The decisions merely apply the above-stated rules or involve the acceptance of an offer to a contract by performance, or are otherwise inapplicable.

Petitioner asserts, however, that the Court should review the case in order to clarify its decision in *Helvering* v. *Northwest Steel Mills, supra,* on the question whether Section 26 (c) (1) requires a contract signed by the corporation, and to resolve an asserted conflict between the decision below and decisions of other Circuit Courts of Appeals on the question (Pet. 7–9, 31). However, the court below stated that the contract was neither signed nor authorized by petitioner; that neither Cereal nor Bohemian entered into it as agent of petitioner; that it was never expressly ratified or adopted by petitioner; that petitioner's first reference to it by resolution passed on May 8, 1937, failed to satisfy the statutory requirement of a written contract executed prior to May 1, 1936; and that, although petitioner was to a large extent a third party beneficiary, the statute contemplated something more (R. 165–166). In sum, therefore, the court held that the case involves no corporate act which could be deemed an execution of a contract in any sense of the word "execute" (Sec. 26 (c) (1)). Conversely, in *Helvering* v. *Northwest Steel Mills, supra,* and the allegedly conflicting Circuit Court decisions, there was a corporate act which might be deemed an execution of a contract and it was pertinent to inquire whether Section 26 (c) (1) contemplates only an "execution" by signature of the corporation. That question is irrelevant here and, hence, review of the

instant case by this Court will not aid in clarifying the Court's decision in the *Northwest Steel Mills* case or in resolving any conflict on the question between the Circuit Courts of Appeals. The decision below is, in fact, in accord with the other decisions which involve similar circumstances. See *Caroline Mills* v. *Commissioner,* 126 F. 2d 857 (C. C. A. 5th); *Phebus Oil Co.* v. *Commissioner,* 134 F. 2d 217 (C. C. A. 5th); *Bolivian International Mining Corp.* v. *Commissioner,* 1 T. C. 1110, affirmed *per curiam,* 142 F. 2d 556 (C. C. A. 2d), pending on petition for certiorari in No. 436.

CONCLUSION

The decision below is correct and involves no important question of law or real conflict of decisions. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
MELVA M. GRANEY,
Special Assistants to the Attorney General.

OCTOBER 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944